Filed 9/22/06 In re C.S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re C.S., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. GABRIELLE S., Defendant and Appellant.	E040376 (Super.Ct.No. JUV084985) **OPINION**

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Reversed with directions.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

Mary Elizabeth Handy, under appointment by the Court of Appeal, for Minor.

Defendant and Appellant Gabrielle S. (Mother) appeals from an order terminating her parental rights to nine-year-old C.S.[1] Mother contends (1) the juvenile court erred by failing to apply the "sibling relationship exception" embodied in section 366.26, subdivision (c)(1)(E) of the Welfare and Institutions Code[2] to prevent the termination of parental rights; and (2) the juvenile court erred by failing to ensure that the Riverside County Department of Public Social Services (DPSS) adequately complied with the provisions of the Indian Child Welfare Act (the ICWA) (25 U.S.C. § 1901 et seq.). We agree that the notice provisions of the ICWA were not adequately complied with and will remand the matter for that limited purpose. We reject Mother's remaining contention.

I

FACTUAL AND PROCEDURAL BACKGROUND

A referral was received on August 23, 2004, alleging that S.F. and C.S. had been physically abused by Mother. The family was homeless and staying at a shelter. Mother was seen pinning S.F. up against a soda machine, trying to take S.F.'s purse, and biting S.F.'s arm to make her let go of the purse. C.S. was wearing pajamas and no shoes and appeared disheveled. C.S. had a bruise under her eye, and S.F. had a blemish on her forehead. C.S. stated the bruise was caused by S.F. when she slapped C.S. with a towel. The family had been observed panhandling at a Rite-Aid store. Neither child was enrolled in school. Another referral was received on September 16, 2004, alleging

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[1] Minor's older sibling, S.F., who is now 19 years old, was also the subject of the juvenile dependency matter below, but she is not a party to this appeal.

[2] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

caretaker absence or incapacitation. The family was observed sleeping outside, and C.S. was sleeping in a stroller.

DPSS attempted to make contact with the family. Eventually, social workers made contact with Mother on September 16, 2004, at a hotel room in Corona. Mother reported that she had been homeless since October 2003 and that the family had been living in shelters, motels, and various other places. The only food she had available for the children was half of a bag of cereal. She had been living off of government aid and had no plans for providing shelter or food for the children. Mother and S.F. had a very chaotic relationship; the two of them engaged in mutual assaultive and combative behavior.

While a social worker was speaking with the family, Mother grabbed C.S. and attempted to flee the hotel room. She pushed one of the social workers out of her way and ran out. Mother was observed attempting to get into people's cars and running across a street with moving traffic while carrying C.S. The police located Mother and assisted in detaining C.S. Mother was combative with the officers and caused one of the officers to be cut several times on his wrist, resulting in significant bleeding. S.F. and C.S. were taken into protective custody.

S.F. reported that Mother had a history of abusing methamphetamine and had allowed her to use cigarettes at the age of nine. S.F. further stated that the family was homeless; that Mother had engaged in domestic violence in front of her and C.S.; that Mother's behavior was erratic, and Mother was in constant belief the family was not safe; that Mother had mental health issues; and that Mother would leave S.F. alone at a shelter for two to three days at a time. Mother had prior allegations for severe neglect in January

and March 1995, caretaker absence in March 2000, general neglect and caretaker absence in April 2004, and general neglect in June 2004.[3] Mother had been offered services in April 2004; however, she did not follow through. Mother also had a lengthy criminal history, and there was an active warrant for her arrest.

On September 20, 2004, DPSS filed section 300 petitions on behalf of S.F., who was then 17 years old, and C.S., who was then seven years old, pursuant to section 300, subdivisions (b), (c), and (g).

In a jurisdictional/dispositional report filed October 7, 2004, the social worker noted Mother reported that she may be of Cherokee decent; however, she was not registered with any tribe. The social worker also noted a strong bond between Mother, S.F., and C.S. S.F. appeared to be parentified, reporting a history of caring for C.S., and she spoke of protecting and caring for her sister. She also requested unsupervised time with her sister.

On October 13, 2004, the juvenile court found the allegations in the petition true, with the exception of allegation b-3 (that Mother had allowed S.F. to smoke cigarettes since the age of nine), which was stricken by agreement of the parties. The children were declared dependents of the court and placed in a suitable foster home. Mother was provided with reunification services and ordered to participate. The court authorized the social worker to look into keeping the children together after S.F. attained the age of 18 years.

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[3] Mother also had other children. These children are not a part of this dependency.

By April 2005, the six-month review hearing, Mother's whereabouts were unknown. Her oldest son informed the social worker that Mother had been arrested, but there was no record of her arrest with the county jail. Mother had failed to participate in any part of her case plan; nonetheless, the social worker recommended an additional six months of services for her. Mother had had weekly visits with her children until November 2004, when she disappeared. As to S.F., the social worker recommended terminating her case, as S.F. had reached the age of majority. S.F.'s present caregiver had agreed to allow S.F. to continue to live in her home after her dependency was closed.

At the April 7, 2004, six-month review hearing, S.F.'s dependency was terminated. The court continued Mother's reunification services as to C.S. and authorized sibling visits between S.F. and C.S.

In a status review report filed September 16, 2005, the social worker noted the ICWA "does not apply." The social worker recommended terminating Mother's reunification services and setting a section 366.26 hearing. Mother's whereabouts were unknown. S.F. reported that Mother was incarcerated at the county jail in Rancho Cucamonga. Mother had been arrested on charges of failure to appear and vehicle theft. She was to be released at the end of September 2005. She still had not participated in any part of her case plan and had failed to show up for weekly visits with C.S. C.S.'s foster parents were interested taking legal guardianship of her.

At the September 27, 2005, 12-month status review hearing, Mother's counsel requested a contested hearing. At that time, Mother represented to the court that she and C.S.'s father may be eligible for membership in the Cherokee tribe. The court ordered DPSS to give notice to the Cherokee tribes and the Bureau of Indian Affairs (BIA).

A notice of review hearing was filed on October 6, 2005. This document was sent to the BIA, Indian Child and Family Services, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, and the United Keetowah Band of Cherokee Indians. This document provided notice of the proceedings and of the right to intervene.

On November 2, 2005, following argument by counsel, the trial court terminated Mother's reunification services and set a section 366.26 hearing.

Mother filed a notice of intent to file a writ petition on November 4, 2005. Mother's counsel subsequently withdrew the petition.

A notice of hearing on selection of a permanent plan was filed on November 16, 2005. This document was sent to the BIA, Indian Child and Family Services, and the three Cherokee tribes. It provided notice of the proceedings and of the right to intervene. Similar documents were filed on January 11 and March 20, 2006, which were also sent to the BIA, Indian Child and Family Services, and the three Cherokee tribes. There is no evidence in the record to suggest a JV-135 form was mailed to the tribes and/or the BIA. There are also no responses in the record from the relevant tribes and/or the BIA.

In a section 366.26 report dated March 21, 2006, DPSS requested that adoption be found to be the appropriate plan for C.S. C.S. was well adjusted in her prospective adoptive parent's home. Her educational, physical, and emotional needs were being met by her caregiver, and her prospective adoptive parent was "very emotionally attached" to C.S. C.S. and the prospective adoptive mother had a reciprocal bond and appeared to be attached to each other. C.S. referred to her as "mom" and was observed to be happy and comfortable in her home. The prospective adoptive mother understood the responsibility of adoption and was aware of the importance of maintaining appropriate contact with

C.S.'s biological relatives. S.F. was originally placed in this same home. When S.F. turned 18 years old, she was given an opportunity to remain in the home with her sister. However, S.F. had chosen to move out on her own and had not maintained contact with C.S.

At the hearing held on April 20, 2006, S.F. testified. She stated that she had had a close relationship with her sister during the years that they had lived together and that she had assumed a big responsibility role for C.S. She also testified that she was originally placed in the same home with C.S. until she was removed three months later because there was a concern as to her relationship with C.S.; she was being too much like a parent to C.S. S.F. was then placed in a home across the street from C.S., where she resided from December 2004 until October 2005. From December 2004 to April 2005, she visited C.S. once a month. After she turned 18 years old, she was told that she had to ask the social worker if she could visit. She claimed she had left messages for the "old social worker," who did not call her back. She stated that she last saw her sister in March 2006. She disagreed with the permanent plan of adoption for C.S. and stated that she wanted to maintain a sibling relationship with her sister. Prior to the March visit, S.F. stated that she did not visit C.S. "very much." She also admitted that she did not visit C.S. at all for at least a six-month period. She did have telephone contact with C.S., however, and had called C.S. two to three times a month. She claimed she was hindered from calling more because she did not have access to a telephone.

Following S.F.'s testimony, the court commented that it was aware that S.F. and C.S. had a very close relationship, to the point that C.S. was dependent on S.F. and S.F. was actually raising C.S. The court also stated that S.F. could not be a parent, but she

was placed in that role, and C.S. looked up to S.F. as a parent; that is why they had been separated. The court further stated that it had every intention of making sure C.S. and S.F. maintained a relationship, and the prospective adoptive parent was willing to do that. The court, finding C.S. adoptable, terminated parental rights. It also found none of the exceptions to termination of parental rights applied. The matter was referred to mediation for a postadoption contract for sibling visitation with S.F. This appeal followed.

II

DISCUSSION

A. *"Sibling Relationship" Exception*

At a section 366.26 hearing, the court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it must select adoption as the permanent plan, unless it finds that termination of parental rights would be detrimental to the child under one of the five exceptions set forth in section 366.26, subdivision (c)(1)(A) through (E). (See *In re Jamie R.* (2001) 90 Cal.App.4th 766, 773.)

Mother vehemently argues that the juvenile court erred in finding that the sibling relationship exception to adoption under section 366.26, subdivision (c)(1)(E) did not apply. This subdivision provides an exception to the termination of parental rights if the court finds a compelling reason for determining that termination would be detrimental to the child due to a "substantial interference with a child's sibling relationship, taking into

consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(E).)

The juvenile court undertakes a two-step analysis in evaluating the applicability of the sibling relationship exception. First, the court is directed "to determine whether terminating parental rights would substantially interfere with the sibling relationship by evaluating the nature and extent of the relationship, including whether the child and sibling were raised in the same house, shared significant common experiences or have existing close and strong bonds. [Citation.] If the court determines terminating parental rights would substantially interfere with the sibling relationship, the court is then directed to weigh the child's best interest in continuing that sibling relationship against the benefit the child would receive by the permanency of adoption." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951-952.) "[T]he concern is the best interests of the child being considered for adoption, not the interests of that child's siblings." (*In re Naomi P.* (2005) 132 Cal.App.4th 808, 822.)

"Reflecting the Legislature's preference for adoption when possible, the 'sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption. It only applies when the juvenile court determines that there is a "compelling reason" for concluding that the termination of parental rights would be "detrimental" to the child due to "substantial interference" with a sibling relationship.'

[Citation.] Indeed, even if adoption would interfere with a strong sibling relationship, the court must nevertheless weigh the benefit to the child of continuing the sibling relationship against the benefit the child would receive by gaining a permanent home through adoption. [Citation.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 61.) We review the court's finding on this issue for substantial evidence.[4] (*In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1017.)

Here, as Mother points out, all parties and the juvenile court agreed that S.F. and C.S. were very bonded and that continued contact between the siblings was important. There was no evidence that terminating parental rights would substantially interfere with the sibling relationship. According to the record, the prospective adoptive mother was aware of the importance of maintaining appropriate contact with C.S.'s birth relatives as long as it was in C.S.'s best interests. The prospective adoptive parent was also open to maintaining contact with C.S.'s birth relatives. S.F. knew C.S.'s prospective adoptive parent because she had lived with her; after S.F. had left that home, she was able to maintain contact with C.S. There was no evidence in the record that C.S. will not continue to have contact with her sister.

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[4] We note that courts have reached different conclusions as to the standard of review that applies to a juvenile court's ruling on exceptions to adoptability under section 366.26, subdivision (c)(1). In *In re Autumn H.*, *supra*, 27 Cal.App.4th 567, the court held that a finding that no exceptional circumstances exist to prevent the termination of parental rights is reviewed under the substantial evidence test. (*Id*. at pp. 575-576.) In contrast, in *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, the court applied the abuse of discretion standard of review. (*Id*. at pp. 1351-1352.) For purposes of the present case, it makes no difference which standard applies because, as discussed, *post*, we conclude that the juvenile court did not err under either test.

Mother attacks the credibility of the evidence that the prospective adoptive mother is willing to maintain the sibling relationship. Mother accuses the foster mother of causing the children to be separated and frustrating contact between S.F. and C.S. However, credibility issues are questions for the trier of fact. (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.) In addition, the record belies Mother's claims. S.F. testified that she was removed from the foster mother because S.F. was being too much like a parent to C.S. and that the foster mother and the social worker were concerned about her relationship with C.S. S.F. also acknowledged that even after she was moved to the foster home across the street from C.S.'s foster home she was able to have contact with her sister. S.F. recognized that she was able to make telephone contact with C.S. two to three times a month. There is no evidence that the foster mother interfered with the sibling relationship. Rather, based on S.F.'s statements, it appears as though S.F. herself chose to limit her contact with her sister. S.F. gave no explanation of why she did not maintain regular contact with C.S., instead claiming the social worker and/or the foster mother thwarted her attempts. She also asserted that she was only able to call C.S. two to three times a month because she did not have access to a telephone: the home where she stayed did not have a telephone, and she did not have money to buy a calling card. S.F. also admitted that she had not visited her sister in six months. Though S.F. may have had limited resources to telephone her sister, there is no evidence to suggest that she could not have visited with her sister or that the foster mother had interfered with her relationship with her sister.

Moreover, there was no evidence that C.S. would suffer any detriment from being adopted. The suggestion that C.S. would not have a relationship with S.F. or would

somehow suffer detriment due to some actions by the foster mother in the future or once C.S. is adopted is speculation and without support in the record. (See *In re Jacob S.*, *supra,* 104 Cal.App.4th at p. 1019 [sibling exception did not apply when, among other reasons, no evidence that relationships between siblings will necessarily cease upon termination of parental rights].) It was in C.S.'s best interests to be adopted by her foster mother. C.S. had verbalized that she wanted to be adopted by her caregiver, although due to her age (nine) she may not have fully understood exactly what adoption meant. The record shows that C.S. and her prospective adoptive mother had a strong bond and mutual love and respect for each other. C.S. stated that she wanted to stay in the care of the prospective adoptive mother. She appeared to feel comfortable and safe in the home, and the prospective adoptive mother provided C.S. with security and stability.

For the foregoing reasons, we hold that there is substantial evidence in the record to support the court's conclusion that the sibling relationship exception to adoption does not apply.

B. *ICWA Notice*

Mother next contends the juvenile court failed to comply with the notice provisions of the ICWA. DPSS admits that it did not comply with rule 1439 of the California Rules of Court but maintains that this court can nonetheless find substantial compliance.

Under the ICWA, when a child subject to a dependency proceeding is or might be an Indian child, as that term is defined in the act, each tribe of which the child might be a member or eligible for membership must be notified of the dependency proceeding and of the tribe's right to intervene in the proceeding. If the identity of the tribe cannot be

determined, notice must be sent to the Secretary of the Interior through the BIA. (25 U.S.C. § 1912; Cal. Rules of Court, rule 1439(f).) If proper notice under the ICWA is not given, the child, the parent, or the tribe may petition the court to invalidate the proceeding. (25 U.S.C. § 1914; Cal. Rules of Court, rule 1439(n).)

The purposes of the ICWA are to protect the interests of Indian children and to promote the stability and security of Indian tribes and families. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) The court and DPSS have an affirmative duty to inquire whether a dependent child is or may be an Indian child. (Cal. Rules of Court, rule 1439(d).) Moreover, it is up to the party seeking to terminate parental rights to notify the BIA or the tribe in order to determine the child's ICWA eligibility. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 734-735.) The Indian status of the child does not need to be certain for the notice provisions to apply. (*Kahlen W.*, at p. 1422; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110.)

The duty to give notice initially arises only "where the court knows or has reason to know that an Indian child is involved" in the proceeding. (25 U.S.C. § 1912(a); see also Cal. Rules of Court, rule 1439(e).) As defined in the ICWA, an "Indian child" is a child who is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . ." (25 U.S.C. § 1903(4); see also Cal. Rules of Court, rule 1439(a)(1)(A) & (B).) Interpreted to mean only "federally recognized tribes," the term "Indian tribe" is defined as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians . . . ." (25 U.S.C. § 1903(8).)

Under rule 1439 of the California Rules of Court, which is directed at ensuring compliance with the ICWA, a court has reason to know a child might be an Indian child if, among other things, "[a] person having an interest in the child . . . informs the court or the welfare agency or the probation department or provides information suggesting that the child is an Indian child . . . . " (Cal. Rules of Court, rule 1439(d)(4)(A); see also *In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.) Simply stated, the duty to give notice under the ICWA arises when there is information suggesting the child is either a member of a tribe or eligible for membership and is the child of a tribe member. (25 U.S.C. § 1912(a); *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1265.)

Among other things, the ICWA requires proper notice before the juvenile court may terminate parental rights to an Indian child. The courts of this state have declared this notice requirement to be a "key component" of the ICWA. (*In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1421.) Several appellate courts in this state have also stressed the importance of strict compliance with the notice requirements of the ICWA. (See, e.g., *In re H.A.* (2002) 103 Cal.App.4th 1206, 1214-1215; *In re Samuel P.*, *supra,* 99 Cal.App.4th at p. 1267; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 474-475.) The purposes of the ICWA cannot be fulfilled unless proper notice is given to either the identified Indian tribe or the BIA. (*In re C.D.* (2003) 110 Cal.App.4th 214, 224.) Notice, as prescribed by the ICWA, ensures that "the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies." (*Kahlen W.*, at p. 1421.) Furthermore, the ICWA "unequivocally" requires that notice to the Indian child's tribe include both actual notice of the juvenile dependency proceedings and notice to the tribe of its right to intervene. (*Id*. at p. 1422.) A tribe's mere

"awareness" of the existence of a dependency proceeding is not sufficient notice under the ICWA. (*Ibid*.) "[F]ailure to comply with the notice requirements of the ICWA constitutes prejudicial error unless the tribe has participated in or indicated no interest in the proceedings. [Citations.]" (*Samuel P.*, at p. 1265, citing *Kahlen W.*, at p. 1422 and *In re Jonathan D.*, *supra*, 92 Cal.App.4th at p. 111.)

"To satisfy the notice provisions of the [ICWA] and to provide a proper record for the juvenile court and appellate courts, [the social services agency] should follow a two-step procedure. First, it should identify any possible tribal affiliations and send proper notice to those entities return receipt requested. [Citation.] Second, [the agency] should provide to the juvenile court a copy of the notice sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status. If the identity or location of the tribe cannot be determined, the same procedure should be used with respect to the notice to BIA." (*In re Marinna J.*, *supra*, 90 Cal.App.4th at pp. 739-740, fn. 4; see also *In re Elizabeth W.*, *supra*, 120 Cal.App.4th at p. 906.) This second step of filing the relevant documentation avoids appellate complaints of noncompliance with the ICWA when, for instance, the only evidence of compliance is the word of the social worker that notices were correctly sent. (*Elizabeth W.*, at p. 906; *In re Asia L.* (2003) 107 Cal.App.4th 498, 507.) Hence, the social service agency "should provide to the juvenile court a copy of the notice sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status." (*Marinna J.*, at p. 739, fn. 4.)

According to at least one judicial interpretation of a previous iteration of the governing court rule, "while this practice would head off numerous appellate complaints

of non-compliance with the ICWA, the second step of this procedure is not required by the ICWA or by rule 1439." (*In re L.B.* (2003) 110 Cal.App.4th 1420, 1425, fn. 3.) Other courts apparently reached a different conclusion. (See, e.g., *In re Karla C.* (2003) 113 Cal.App.4th 166, 178 [filing the documents with the juvenile court "is an essential component of the ICWA notice process"].) Under the rule as amended effective January 1, 2005, "proof of such notice, including copies of notices sent and all return receipts and responses received, *must* be filed with the juvenile court." (Cal. Rules of Court, rule 1439(f), italics added.) In the same vein, the new SOC 820 form includes a certificate of mailing, which states that it "must" be filed with the court.

With that overview in mind, we turn to the case at hand. DPSS essentially concedes it did not submit to the court proof of notices or the JV-135 form to the three Cherokee tribes or to the BIA and that it did not send a copy of the petition to the BIA or the three Cherokee tribes. However, it argues that it substantially complied with the requirements of the ICWA and that Mother has failed to show a reasonable probability that she would have enjoyed a more favorable result in the absence of the errors. DPSS also claims that Mother has waived this issue by silently standing by "while the [juvenile] [c]ourt went forward without notice being done via the JV-135 form." We cannot agree.

Initially, we note that Mother did not waive this issue on appeal. It is well settled that the issue of ICWA notice is not waived by the parent's failure to first raise it in the trial court. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 849; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707.) In addition, cases have concluded it is not waived by the parent's failure to appeal the claimed error at the earliest opportunity. (*Nikki R.*, at p. 849;

Dwayne P. v. Superior Court (2002) 103 Cal.App.4th 247, 261; *In re Marinna J.*, *supra*, 90 Cal.App.4th at p. 739.)

In *Marinna J.*, the court reasoned that a parent could not waive the tribe's right to adequate notice because that would make it "virtually certain" that the tribe could not assert its rights under ICWA. "Under these circumstances, it would be contrary to the terms of the [ICWA] to conclude . . . that parental inaction could excuse the failure of the juvenile court to ensure that notice under the [ICWA] was provided to the Indian tribe named in the proceeding. [¶] . . . Our conclusion is consistent with the protections afforded in the [ICWA] to the interests of Indian tribes." (*In re Marinna J.*, *supra*, 90 Cal.App.4th at p. 739.) *Dwayne P.* reached the same result but based its conclusion on the ICWA provision granting any party the right to petition to invalidate a proceeding if the notice provisions are violated. (See 25 U.S.C. § 1914.) The court also found the notice issue survived the availability of an earlier appeal because the juvenile court has a sua sponte duty "to give the requisite notice itself or ensure the social services agency's compliance with the notice requirement. [Citations.] [N]otice is intended to protect the interests of Indian children and tribes despite the parents' inaction." (*Dwayne P. v. Superior Court*, *supra*, 103 Cal.App.4th at p. 261.)

Based on well-settled case law, we reject DPSS's suggestion that Mother waived this issue. The notice requirement is designed to protect the interests of the tribe; to the extent a notice defect impairs the tribe's ability to participate, another party cannot waive it.

We turn now to Mother's claim that the ICWA notice here was inadequate. Although the court ordered DPSS to notify the BIA and the Cherokee tribes, DPSS did

not mention the issue again except to indicate in its reports that the ICWA did not apply. In addition, though DPSS provided notice of hearings to the tribes four times in the proceedings and of their right to intervene, the record is devoid of any evidence that DPSS mailed the JV-135 form to the BIA or the three Cherokee tribes, that a copy of the petition was mailed to the BIA or the tribes, or that DPSS filed with the court the mailing receipts. Essentially, there is inadequate evidence in the record here that DPSS mailed the appropriate forms and information to the BIA and the three Cherokee tribes or that the court reviewed such forms. Based on this record, even if the juvenile court had reviewed the ICWA notice issue, the court had no way to assess whether DPSS supplied enough information to the relevant tribes and the BIA to enable them to knowingly determine C.S.'s Indian heritage. Likewise, for this same reason, we cannot conclude that DPSS complied, or even substantially complied, with the notice provisions of the ICWA. Even if we accept DPSS's assertions that the social worker mailed the requisite notices to the three Cherokee tribes and the BIA, there still is no foundational basis for us to determine *what* information was provided to the three Cherokee tribes and the BIA and whether that information was sufficient.

Accordingly, on this record, we cannot find DPSS substantially complied with the ICWA's notice requirements or that any error was harmless. Where there is reason to believe a dependent child may be an Indian child, defective ICWA notice is "usually prejudicial" (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1411), resulting in reversal and remand to the juvenile court so proper notice can be given. (See, e.g., *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 237; *In re H.A.*, *supra*, 103 Cal.App.4th 1206, 1215; *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1109.)

We deny Mother's request that this court revisit the issue of conditional reversals. The issue of which orders must be vacated at this stage of the proceedings for failure to comply with the ICWA was thoroughly discussed by this court in *In re Jonathon S.* (2005) 129 Cal.App.4th 334 at pages 340 through 342, where we concluded that "the only order subject to reversal in this appeal is the order terminating parental rights." (*Id.* at p. 342.) Division One of this appellate district reached a similar result in *In re Francisco W.* (2006) 139 Cal.App.4th 695 at pages 704 to 710. The same reasoning applies in the subject appeal, and we reach the same conclusion here and see no reason to revisit the issue.

Hence, we will reverse the order terminating Mother's parental rights and remand this matter to the juvenile court for the limited purpose of complying with the ICWA notice requirement. The juvenile court is to order DPSS to comply with the notice requirements of the ICWA and case law interpreting the federal statute. (See, e.g., *In re Karla C., supra,* 113 Cal.App.4th 166.) DPSS is to provide the court with complete copies of the required ICWA notices that it either previously sent or those that DPSS sends hereafter, along with return receipts for these notices and all responses received from the Cherokee tribes and the BIA.

III

DISPOSITION

The order terminating parental rights is reversed. The juvenile court is directed to order DPSS (1) to give proper ICWA notice to and file with the juvenile court the notices, return receipts, and any responses for the court's inspection, and (2) to comply

with the notice provisions of the ICWA, the relevant case law interpreting the ICWA, and the views expressed in this opinion.

Once the juvenile court finds that there has been substantial compliance with the notice requirements of the ICWA, it shall make a finding with respect to whether the child is an Indian child. (See Cal. Rules of Court, rule 1439(g)(5).) If at any time within 60 days after notice has been given there is a determinative response that the child is or is not an Indian child, the juvenile court shall find in accordance with the response. (Cal. Rules of Court, rule 1439(g)(1), (4).) If there is no such response, the juvenile court shall find that the child is not an Indian child. (Cal. Rules of Court, rule 1439(f)(6).)

If the juvenile court finds that the child is not an Indian child, it shall reinstate the original order terminating parental rights.

If the juvenile court finds that the child is an Indian child, it shall set a new Welfare and Institutions Code section 366.26 hearing, and it shall conduct all further proceedings in compliance with the ICWA and all related federal and state law.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

KING
J.